



U.S. Citizenship  
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FILE:

SRC 06 130 51141

Office: TEXAS SERVICE CENTER Date: MAR 06 2007

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*

S Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an energy efficiency consulting firm. It seeks to employ the beneficiary permanently in the United States as its Director of Energy Engineering pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. While the petitioner has now established its recent ability to pay the proffered wage, the documents submitted do not relate back to the priority date in this matter.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on December 29, 2005. The proffered wage as stated on the ETA Form 9089 is \$87,006 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of August 16, 2004.

On the petition, the petitioner claimed to have an establishment date on December 1, 2003, a gross annual income of \$3,000,000, a net income of \$1,000,000 and nine employees. In support of the petition, the petitioner submitted its 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 9, 2006, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide evidence of its past and current payment of wages to the beneficiary.

In response, the petitioner submitted the beneficiary's 2005 Form W-2, Wage and Tax Statement and pay stubs for 2006, all issued by the petitioner. The petitioner also submitted affirmations of the company's viability, contracts for services and a quarterly wage and withholding report.

The petitioner's 2005 tax return reflects the following information:

Net income	(\$298,244)
Cash	\$183
Other Current Assets	\$1,000
Total Current Assets	\$1,183
Current Liabilities	\$15,245
Net current assets	(\$14,062)

The beneficiary's Form W-2 reflects that he earned \$65,000 in 2005 and the pay stubs reflect wages of \$2,500 bi-weekly from January 2006 through mid-April 2006 (\$65,000 annually), at which time the beneficiary's wages increased to \$2,884.62 bi-weekly (\$75,000.12 annually).

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on June 28, 2006, denied the petition. In the final decision, the director noted that the petitioner was not paying the beneficiary the full proffered wage and that the petitioner's net income and net current assets were both negative. The director further noted that the petitioner cannot rely on affirmations of its ability to pay the proffered wage as it employs less than 100 workers.

On appeal, counsel asserts that the 2005 tax return does not cover the priority date. The petitioner submits bank statements for April through June 2006 reflecting final balances of \$133,989.08, \$206,773.78, and \$273,309.15.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2005 or 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas

1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

On appeal, counsel asserts that the petitioner need only demonstrate its ability to pay the proffered wage as of April 2006. As discussed above and in the director's decision, however, the priority date in this matter is December 29, 2005. The petitioner did not submit its bank statements for December 2005, January 2006, February 2006 or March 2006, although the April 2006 statement reveals that the petitioner had a balance of \$99,301 in March 2006.

Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. This regulation, however, does allow additional material "in appropriate cases." Thus, in some cases, as demonstrated by the request for additional evidence for another case submitted on appeal, the director may request bank statements. In this matter, we acknowledge that the petitioner's 2006 tax return would not yet be available. Thus,

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<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

bank statements could be relevant in this matter. Bank statements, however, show the amount in an account on a given date, and cannot always show the sustainable ability to pay a proffered wage. Moreover, the funds reported on a petitioner's bank statements do not typically reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that is already considered in determining the petitioner's net current assets. In this matter, according to Schedule L, the petitioner ended 2005 with only \$183 in cash. The petitioner has not submitted bank statements for the months between the end of 2005 and April 2006. Thus, we cannot determine when the petitioner's cash increased to close to \$100,000. Without evidence that this cash was available in January 2006, we cannot determine that this cash was available to pay the proffered wage as of the priority date, December 29, 2005.

The petitioner has not demonstrated that it paid the beneficiary the full proffered wage. In 2005, the petitioner shows a negative net income and negative net current assets. We acknowledge that the petitioner need only demonstrate an ability to pay the difference between the proffered wage and the wages paid for three days in December 2005. Nevertheless, the petitioner must demonstrate that its financial situation improved in 2006. The biweekly proffered wage is \$3,346.40, \$846.40 more than the biweekly wages paid in January through mid-April 2006 and \$461.78 more than the biweekly wages paid beginning in mid-April 2006. While the petitioner's bank statements reflect balances increasing by these amounts in March through June 2006, the petitioner has not submitted bank statements for January and February 2006. While focusing on these two months may appear highly technical, we reemphasize that the petitioner only claimed \$183 in cash on its Schedule L for the end of 2005. Given the above discussion, the petitioner has not shown the ability to pay the proffered wage as of the priority date in December 2005.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.